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No. 03-360

Supreme Court, U.S.
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In The
Supreme Court of the United States

CURTIS MAJOR, DAVID DOBSON,
BENJAMIN BUCHANAN, TROY BUCHANAN,
and CARLOUS L. BURCH,

Petitioners,

v.

ELLER MEDIA COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED

Whether employees who waived their right to sue their former employer, the selling company, for any discrimination related to their termination, can hold the purchasing company vicariously liable for alleged discrimination of one of the selling company's managers, over whom the purchasing company had no control or right of control and who made hiring recommendations while employed by the selling company.

CORPORATE DISCLOSURE

Since July 2001, Eller Media Company has been known as Clear Channel Outdoor, Inc. Clear Channel Communications, Inc. is the parent company of Clear Channel Outdoor, Inc. and indirectly owns 100% of Clear Channel Outdoor, Inc.'s stock.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Eller Media Company, ("Eller Media"), requests that this Court deny the Petition for A Writ of Certiorari ("Pet.") filed by Curtis Major, David Dobson, Benjamin Buchanan, Troy Buchanan, and Carlous Burch ("the petitioners"). The petition seeks review of the Eleventh Circuit's summary affirmance of the district court's unpublished opinion granting summary judgment for Eller Media.

RESTATEMENT OF THE FACTS AND CASE

A. The Undisputed Facts

The petitioners are black, former employees of AK Media Florida ("AK Media"). AK Media was in the business of leasing land for billboards, constructing billboards, and posting advertisements on billboards in South Florida. All five petitioners worked in AK Media's Operations Department, which comprised sixty-four employees. Don Hall managed the Operations Department for ten years – from 1989 to January 2000. Other departments at AK Media included accounting, real estate, and sales. Frank Sofia, Vice President of Finance, was responsible for accounting, payroll, and benefits and was also the local human resources coordinator.

In the fall of 1999, Eller Media Company ("Eller Media"), a Phoenix-based corporation, offered to purchase AK Media's assets. By that time, AK Media had grown to 112 employees, and Eller Media had a small South Florida division comprising twenty-five employees. After closing on the purchase, Eller Media intended to combine the two companies' departments, consolidate job functions, reduce

personnel, and run a more cost-efficient operation. Eller Media selected John Jacobs, who at the time was based in Atlanta, to be president of its new South Florida Division.

In December, Mike Deeds, Eller Media's Executive Vice President of Operations, visited from Phoenix. He toured both the Miami and West Palm Beach AK Media plants with Don Hall. During his visit, Deeds asked Hall to "consider [the] reduction" of people, equipment, and fleet. Later that month, Deeds called Hall from Phoenix and gave him the number of employees he felt it would take to run the Operations Department after the acquisition. He told Hall to think about recommendations of employees to be hired by Eller Media and to give some thought to reducing the number of vehicles.

Around this time, John Jacobs began gathering information about the various AK Media departments and personnel. He asked Frank Sofia to work with Don Hall and Bill Hull, the assistant manager of the Operations Department, to come up with the best qualified and most productive workers because the new Eller Media would have significantly fewer employees. Jacobs told Sofia that, because he would be combining the Eller Media and AK Media departments but operating with a smaller workforce, he needed cross-trained employees and the most qualified and best performing employees. Jacobs did not speak to Hall.[1]

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[1] Around this same time, Jacobs asked Sofia what kind of employee Don Hall was. Sofia told him that Hall was a good employee; that he had worked with him since starting at AK Media; that they had worked on important projects together and had a good working relationship; and that Hall was a nice guy and got along with other employees.

As he was instructed, Sofia told Hall to recommend those Operations Department employees he felt could do the job. Hall spent two to three days and nights preparing a handwritten list, which he gave only to Sofia. In preparing the list, he relied on his years of experience and on his own criteria of seniority, performance, character, and experience. Hall also consulted employee files he kept in the Operations Department. Before submitting his recommendations to Sofia, Hall showed them to Bill Hull, who agreed with his choices.

At the time Hall composed his list of recommendations, he was on AK Media's payroll and functioning as AK Media's Operations Manager. He did not know whether Eller Media would offer him a job. In fact, Jacobs was trying to choose between Charlie Neville, the Eller Media Operations Manager, and Hall for the position of Operations Manager at the new Eller Media.

During the week between Christmas and New Years, Jacobs met with Sofia and Hall in Miami to review the list of recommended Operations Department employees. At this meeting, several employees were discussed, including petitioner Curtis Major. At the time, Major was the supervisor of Posting. Hall had included Major on his recommendation list in the position of billposter, not Posting Supervisor, the job Major held at AK Media. At the meeting, however, Sofia expressed concern about Major's ability to cooperate with and be supervised by Orlando Ortiz, the employee chosen to act in the dual capacity of Posting Supervisor and Safety Director in the new Operations Department. Jacobs determined from the discussion with Sofia and Hall that Major should not be offered employment because he had trouble supervising, was not a safe worker, and had difficulty accomplishing his workload. At

the time of this meeting and when Jacobs later made the hiring decisions, he did not know the race of any of AK Media's employees.

On January 4, 2000, a list posted above the time clock at AK Media named those Operations Department employees who were not to be offered employment with Eller Media. The petitioners' names were on that list. The listed employees were asked to convene on the second floor, where AK Media personnel distributed the AK Media severance documents and reviewed them with the terminated employees.

The forty-two terminated employees, including the petitioners, were given a Separation Agreement and General Release to read and sign. Under the terms of the Agreement, the terminated employees waived and released AK Media from any claims that "have arisen up through the date of this Agreement, including those related in any way to his/her employment by [AK Media] or ***his/her separation***." (R3-61-Ex.C-2; emphasis added.) The waived claims included any the employees might have had under federal, state, or local discrimination laws and any other claims "growing out of" their terminations from AK Media. Specifically, the terminated employees, in exchange for severance pay, waived all claims under Title VII, the 1991 Civil Rights Act, the Equal Pay Act, the Age Discrimination in Employment Act, and the Employee Retirement Income and Security Act of 1974.

The petitioners signed the Agreement and collected their severance pay.

Also, on January 4, 2000, Frank Sofia, Don Hall, and the remaining AK Media employees learned that they had jobs with the new Eller Media.

B. The Proceedings Below

1. The Complaint

Despite having agreed to waive any and all discrimination claims they may have had against AK Media, the petitioners filed EEOC discrimination complaints against AK Media and later amended their EEOC charges to include Eller Media. The petitioners then sued Eller Media, each alleging identical claims under Title VII, § 1981, and Florida's Civil Rights Act. Each plaintiff claimed that Eller Media "engaged in discriminatory employment practices . . . which resulted in Plaintiff . . . not being hired and/or retained by Defendant Eller Media . . . for employment in conjunction with its purchase of AK Media on the basis of his race." (R1-1-16-18.) Thus, the plaintiffs' case against Eller Media was one of disparate treatment, not disparate impact. Moreover, the plaintiffs' factual allegations did not support their claim that Eller Media had "engaged in discriminatory employment practices." Rather, their complaint asserted that Eller Media was liable for race discrimination because it had "acted upon Hall's recommendations" and Hall had, ***"[d]uring his tenure as Operations Manager for AK Media/Florida,"*** allegedly "engaged in discriminatory practices and disparaging behavior toward [AK's] African American employees." (R1-1-8; emphasis added.)

2. Summary Judgment

Eller Media moved for summary judgment arguing, among other things, that the petitioners sought to hold it vicariously liable for Don Hall's racial bias, which, allegedly, was expressed while Hall was AK Media's employee, and that Eller Media could not be held vicariously liable

for Hall's alleged discriminatory animus because Hall was neither its employee nor its agent before January 4, 2000.[2]

The district court granted Eller Media's summary judgment motion, concluding that Eller Media could not be held vicariously liable for Hall's allegedly biased recommendations because Hall was not Eller Media's agent (Pet. App. B at 9a) and because the petitioners' "cat's paw" theory[3] could not, under existing law, be applied "to find an employer liable for the discriminatory animus of a non-employee." (Pet. App. B at 13a.) The court reached this conclusion after determining from the undisputed facts that, although Eller Media had requested Hall to provide staffing recommendations, Eller Media did not control the process through which Hall made his selections and it retained control over the ultimate hiring decisions. (Pet. App. B at 8a.) Thus, as the district court correctly ruled, because ***control***, an essential element of an agency relationship, was lacking, Hall could not be deemed Eller Media's agent, and Eller Media could not be held vicariously liable for Hall's allegedly discriminatory recommendations.

The district court's opinion remains unpublished and does not appear in electronic data bases.

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[2] Eller Media also moved for summary judgment on the grounds that none of the petitioners could prove a prima facie case of race discrimination and that, even if they could, there was no evidence of discriminatory animus on the part of Don Hall or of pretext on the part of Eller Media.

[3] *See Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998) (citing several "cat's paw" cases and presenting various definitions of the theory).

3. The Appeal

The plaintiffs appealed to the Eleventh Circuit, raising two points in their initial brief. They argued that the district court "failed to properly apply the various theories of agency under which Eller may be held liable," and that it erred in holding that the "cat's paw" doctrine was inapplicable to the facts of this case. After briefing and oral argument, the appellate court affirmed the summary final judgment for Eller Media. (Pet. App. A at 2a.)

The Eleventh Circuit's opinion is printed in a *table* in the federal reporter and contains one word – "affirmed."

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit's Summary Affirmance Does Not Create Conflict or Precedent, and the District Court's Unpublished Opinion Is Limited To the Specific Facts Of This Case

The Eleventh Circuit's summary affirmance does not create conflict with any other circuit court decision. To their credit, the petitioners do not contend that the one-word opinion creates conflict; yet it is well established that this Court rarely exercises its discretionary jurisdiction unless the opinion sought to be reviewed "conflict[s] with the decision of another United States court of appeals on the same important matter." U.S. Sup. Ct. Rule 10(a); *see Watt v. Alaska*, 451 U.S. 259, 275 n.5 (1981) (quoting precursor to Rule 10) (Stevens, J., concurring). The petitioners seem to suggest, instead, that the unfavorable result below somehow "conflicts with relevant decisions of this Court." U.S. Sup. Ct. R. 10(c). But, as is obvious from

the one-word opinion, the Eleventh Circuit did not decide an important question of federal law in this case, and without such a decision, conflict with a decision of this Court is impossible.

Moreover, the Eleventh Circuit's summary affirmance has no precedential value. By affirming without a written opinion, the Eleventh Circuit merely approved the *result* reached by the district court; it did not expressly approve its opinion or adopt its reasoning. *See DeShong v. Seaboard Coast Line R.R. Co.*, 737 F.2d 1520, 1523-24 (11th Cir. 1984) (citing *American Fid. & Cas. Co. v. Indem. Ins. Co. of N. Am.*, 308 F.2d 697, 699-700 (6th Cir. 1962)). Therefore, future litigants may not look to the Eleventh Circuit's opinion in this case as standing for any proposition or rule of law, especially in light of the fact that the decision it affirmed remains unpublished and unavailable from electronic databases.

Even if the district court's decision had been published, *it* would have no precedential value. *See Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991) (noting that district courts are not bound, under the doctrine of *stare decisis*, to follow the decision of another district court ***even where the facts*** of a prior district court case ***are the same*** as those later presented to another district court); *In re: Executive Office of the President*, 215 F.3d 20, 24 (D.C. Cir. 2000) ("District Court decisions do not establish the law of the circuit."); *Kalka v. Hawk*, 215 F.3d 90, 100 (D.C. Cir. 2000) ("District court decisions have no precedential effect.").

The district court's decision has no precedential effect. Thus, the petitioners incorrectly state that "the decision below, affirmed on appeal, shields ***an*** employer from

liability under Title VII for its discriminatory failure to hire when that decision is based on the employer's solicited recommendation of a non-employee." (Pet. at 10; emphasis added.) This case turns on the specific facts surrounding Hall's process of making his recommendations and on whether those specific facts showed that Hall was acting under Eller Media's control and thus as its agent. The district court correctly concluded that the specific facts in this case did not support the petitioners' agency theory and ruled that Eller Media could not be held vicariously liable.

Future cases involving a purchasing company's nonretention of the selling company's employees will involve different facts, which will lead to results consistent with those facts. The district court's opinion in this case will not help. Therefore, the district court's holding, or as the petitioners put it, its "fundamental error," will *never* have the "serious and potentially wide-ranging consequences in Title VII litigation" that the petitioners so direly – but mistakenly – predict. (Pet. at 10.)

II. The Petitioners Seek Error Correction

It is obvious from their petition that the petitioners seek this Court's review only because they believe that "the Eleventh Circuit erred in affirming the District Court's conclusion that Don Hall was not Eller's 'agent' for purposes of Title VII." (Pet. at 14.) The petitioners ask this Court to "correct this result." (Pet. at 15, 18.) In other words, the petitioners come to this Court seeking error correction. They want this Court to review the same facts that the district and circuit courts reviewed and then reach the opposite conclusion: that Don Hall *was* Eller

Media's agent. But this Court "do[es] not grant a certiorari to review evidence" or to "discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Yet this is precisely what the petitioners are asking this Court to do.

The only way this Court could address the petitioners' argument that the "facts establish an agency relationship between Eller Media and Don Hall sufficient for purposes of Title VII" (Pet. at 15) would be to review the depositions and other evidence and "discuss specific facts." This Court does not do this because its "certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases." *Watt*, 451 U.S. at 275 n.5 (Stevens, J., concurring).

III. Eller Media Was Entitled to Summary Final Judgment Because Eller Media Exercised No Control Over – and Had No Right to Control – Don Hall At the Time He Made His Recommendations; Therefore, Hall Was Not Its Agent For Purposes of Imputing Title VII Liability

At the time Don Hall prepared the list of AK Media Operations Department employees whom he recommended that Eller Media hire, he was employed by AK Media, on its payroll, and its Operations Department manager. When the petitioners signed AK Media's Severance Agreements and accepted its generous severance pay, they waived their ability to sue AK Media, Hall's employer, for any discrimination occurring while they were employed at AK Media and for any discriminatory actions Hall may have taken while he was employed by AK Media. The petitioners made a choice between giving up the right to

sue AK Media and preserving the right to sue but forfeiting their severance pay. Given the petitioners' choice to give up their right to sue and to accept severance pay, this case must not be viewed, as the petitioners would have it, as one where the allegedly wronged employees were cheated of a discrimination defendant.

Acknowledging that Eller Media had no discriminatory animus, the petitioners sued Eller Media on a vicarious liability theory that has only been applied to impute to an employer the discriminatory conduct of its employee or agent. *See Goldsmith v. City of Atmore*, 996 F.2d 1155, 1162 (11th Cir. 1993) (observing that general agency principles governing the liability of a principal under Title VII come into play only "[o]nce an agency relationship has been established"). An alleged principal cannot be held liable under agency principles for the conduct of one who was never its agent or employee. *See Graves v. County of Dauphin*, 98 F. Supp. 2d 613, 619 (M.D. Pa. 2000). To have prevailed below, the petitioners were required to show sufficient facts to support a finding that Hall was Eller Media's agent. They did not because they could not.

The petitioners tell this Court, as they did the other two courts, that Hall was Eller Media's agent because Eller Media gave him "the exact numbers by which it sought to reduce existing AK Media personnel," "asked Hall to provide [it] with his recommendations," "identified criteria," and "dictated the time frame." (Pet. at 15.) As the district court correctly ruled, none of these factors, whether viewed separately or together, rose to the level of control or right of control required for a finding of agency, even if the term "agent" is "liberally construed." (Pet. at 16.) *See Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 341 (11th Cir. 1982) (noting that, even in Title VII cases, the term

"employee" is to be construed in light of general common law concepts).

In determining whether an agency was created for the purpose of imputing liability under Title VII, federal courts are to apply the general common law of agency. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-55 (1998). Under the *Restatement (Second) of Agency*, "[a]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and ***subject to his control***, and consent by the other so to act." *Restatement (Second) of Agency* § 1(1) (1958) (emphasis added). It has been said that the "critical factor in determining the existence of an agency relationship is the ***degree of control*** exercised by the principal over the agent." *Figi Graphics, Inc. v. Dollar Gen. Corp.*, 33 F. Supp. 2d 1263, 1266 (S.D. Cal. 1998) (emphasis added).

An agency relationship exists only if the principal retains *both* the right to control the ***result*** accomplished *and* the right to control the ***details and means*** by which the result is accomplished. *See Cobb*, 673 F.2d at 339, 342 (affirming the district court's conclusion – in a discrimination case – that no agency existed because "there was no 'supervision' of how the work was to be done"). *See also Bahadirli v. Domino's Pizza*, 873 F. Supp. 1528, 1537 (M.D. Ala. 1995) (noting – in a discrimination case – that "[o]f primary importance" is "the right of the alleged principal to control the day to day functions of the alleged agent"). *Accord Restatement (Second) of Agency* § 1(1) cmt. b ("The agency relation results if, but only if, there is an understanding between the parties which, as interpreted by the court, creates a fiduciary relation in which the

fiduciary is subject to the directions of the one on whose account he acts.").

It is well established that if the alleged principal has no control over the alleged agent's day-to-day activities or task details but has the right to dictate only the ***end result***, then no agency exists. *See Figi Graphics*, 33 F. Supp. 2d at 1266 (emphasis added). In other words, "[i]f a party controls only the outcome of the endeavor, and not the means used to achieve the outcome, then an agency relationship does not exist." *United States v. Tianello*, 860 F. Supp. 1521, 1524 (M.D. Fla. 1994) (citing *Dorse v. Armstrong World Indus., Inc.*, 513 So. 2d 1265, 1268 n.4 (Fla. 1987) (noting that in a true agency relationship, the principal must ***control the means used*** to achieve the outcome, not just the outcome itself)). *Accord Fenton v. Freedman*, 748 F.2d 1358, 1362 (9th Cir. 1984) (noting that if the principal's control may be exercised only as to the result of the services performed and not the means and methods by which it is accomplished, the provider is not an agent).

When these common law agency principles are applied to the undisputed facts of this case, as the district court did here, it is evident that Don Hall was not Eller Media's agent as a matter of law. Frank Sofia, AK Media's accounting manager and human resources coordinator, asked Hall, at Jacob's behest, to recommend Operations Department employees to be offered employment by Eller Media. Jacobs spoke only to Sofia about obtaining the recommendations. Jacobs never spoke to Hall, never gave him any specific criteria or formula to use in selecting the employees to be recommended; never asked Hall what criteria he was going to use; never followed up with him to see what he was doing or how he was doing it; never supervised or

assisted him in the task; and never suggested that he include or exclude any employee or group of employees.

Hall relied on his own thirty years of experience in the business and on his own criteria of seniority, performance, character, and experience. He acted without supervision over a two-to-three-day period to reduce the Operations Department personnel to the number needed. When Hall prepared his handwritten list of recommendations, he was employed by and on the payroll of AK Media and functioning as AK Media's Operations Department manager. He had not received an offer from or accepted a position with Eller Media. In fact, Jacobs was not sure whom he would select as the operations manager of the new Eller Media. After showing Hull his preliminary recommendations, Hall gave his final recommendations only to Sofia. At the time, Hull and Sofia were AK Media employees. And last, Hall had absolutely no authority to offer employment to any of the individuals on his list, no matter what his opinion of them was.

The petitioners argue to this Court, as they did to the other two courts, that Hall was Eller Media's agent because Eller Media had communicated to him the "exact numbers" of employees to be retained and "identified criteria" such as that the retained employees should be able to do multiple jobs. (Pet. at 15.) But what the petitioners still fail to grasp is that what Eller Media communicated to Hall was the expected ***result***: X employees that could do Y. It did not tell him ***how*** to make his selection. It provided him no tools, direction, supervision, or guidance. Under the common law of agency, where the alleged principal communicates only the intended result and does not direct the means or supervise the methods of obtaining the result, an agency relationship subjecting an innocent

principal to Title VII liability cannot be created. *See United States v. Tianello*, 860 F. Supp. at 1524.

The petitioners appear to construe the district court's opinion as holding that Hall was not Eller Media's agent because he was a "non-employee" at the time he made the recommendations and at the time that Eller Media made its hiring decisions. (Pet. at 14, 15.) Yet even a cursory reading of the opinion reveals that the district court did not base its ruling on Hall's status as a "non-employee." (Pet. at 14, 15.) The district court specifically reasoned that, because Hall was not Eller Media's employee at the time he made the staffing recommendations, it had to look to the *Restatement (Second) of Agency* "for an ***agency*** determination." (Pet. App. B at 8a; emphasis added.) Correctly concluding that the "key issue" was "whether Eller Media had **control** of Mr. Hall's activities during this undertaking," the court held that the evidence did not support a finding that Eller Media had the requisite control over Hall or the recommendation process. (Pet. App. B at 8a; emphasis in original.)

Citing to *Williams v. Grimes Aerospace Co.*, 988 F. Supp. 925, 933 (D.S.C. 1997), the district court reasoned that because Eller Media did not name specific individuals it wished to employ and did not involve itself in Hall's selection process, it could not be held vicariously liable under agency theory. (Pet. App. B at 9a.) In reaching its conclusion, the district court further reasoned that "Hall had no authority, apparent or otherwise, to hire any employees for Eller"; that Hall "did not have a job offer at the time he made the staffing recommendations"; that, in making the recommendations, Hall had benefited both AK Media and himself; and thus that Hall had not been acting

exclusively for the benefit of Eller Media. (Pet. App. B at 10a.)

Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978) (*"Manhart"*) and *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983) (*"Norris"*), do not apply here and do not support a different conclusion. First of all, *Manhart* is not an agency case. There, the discrimination defendant, the Department of Water and Power, administered retirement, disability, and death-benefit programs for its employees. 435 U.S. at 704-05. Because no private insurance company was involved, it was the Department itself, not an agent, that imposed the discriminatory requirement that female employees make monthly contributions to the retirement fund that were higher than the contributions required of comparable male employees. *Id.* at 705. The female employees' discrimination suit against the Department, their employer, was therefore based on direct, not vicarious, liability.

Norris is also inapposite. There, the employer, the State of Arizona, did not administer the deferred compensation program at issue. Instead, it chose several private insurance companies to participate in the plan and entered into contracts with those companies to provide the retirement benefit. Employees enrolling in the plan could obtain retirement benefits only from one of the companies the State had contracted with. The plan was discriminatory because it paid female retirees lower benefits than it paid male retirees who had made the same contribution.

Agency was not an issue in *Norris*. It was not disputed that, by written contract, the insurance companies were the State's agents for the provision of this employment

benefit. But even if they were not, as this Court reasoned, "the State of Arizona was itself a party to contracts concerning the annuities to be offered by the insurance companies, and it is well established that both parties to a discriminatory contract are liable for any discriminatory provisions the contract contains, regardless of which party initially suggested the inclusion of the discriminatory provisions." 463 U.S. at 1090. Therefore, the employer's liability in *Norris*, as in *Manhart*, was direct, not vicarious.

Finally, *Meyer v. Holley*, 123 S. Ct. 824 (2003), supports Eller Media's position, not the petitioners'. In *Meyer*, a real estate agent allegedly prevented an interracial couple, the plaintiffs, from buying a house for racially discriminatory reasons. The plaintiffs sued the salesman and the real estate company for violation of the Fair Housing Act. It then sued the company's president and sole shareholder, individually, claiming that he also was vicariously liable for the salesman's unlawful actions. The district court dismissed the claims against the owner, but on appeal, the Ninth Circuit reversed, interpreting the Fair Housing Act to permit the owner to be held personally liable because he had the "right to control" the actions of the sales agent. *Id.* at 829. The owner sought certiorari. This Court granted the owner's petition to decide the issue of whether owners and officers of corporations can be held liable under the Act even if they did not direct or authorize the unlawful discriminatory acts. *Id.* at 828.

This Court reversed the Ninth Circuit because its holding incorrectly construed the Act as departing from traditional vicarious liability principles. As this Court noted, under traditional agency principles, "it is the corporation, not its owner or officer, who is the principal or

employer, and thus subject to vicarious liability for torts committed by its employees or agents." *Id.* at 829. In *Meyer*, this Court confirmed that traditional agency principles are to be applied in the discrimination context. Therefore, here, the district court's ruling was eminently correct.

It cannot be denied that the district court applied traditional agency principles to the undisputed facts when it ruled that Eller Media did not exercise control over Hall or the means and methods he used in composing his list of recommendations, and that Eller Media had no right to control Hall because he was employed by AK Media and exclusively subject to *its* control. Had the district court held Eller Media vicariously liable for the discriminatory acts of a non-employee and non-agent, as the petitioners are now asking this Court to do, then it would have erroneously applied *non*traditional agency principles, as the Ninth Circuit did in *Meyer*.

CONCLUSION

While the petitioners correctly state that "[i]n the Title VII context, traditional agency principles guide" the determinations of the vicarious liability of principals or employers for the acts of their agents or employees (Pet. at 16), they refuse to acknowledge that the district court correctly applied these traditional agency principles. Under traditional agency principles, an alleged principal cannot be held liable for the acts of an alleged agent unless the principal controlled the agent in the accomplishment of the desired result. After reviewing the facts, the district court correctly concluded that Eller Media had no control

over Hall while he was employed by AK Media and thus that Hall was not Eller Media's agent. The district court did as this Court recommended in *Meyer*. In assessing "which 'of two innocent people must suffer,'" the district court determined the matter in accordance with traditional principles of vicarious liability. Because the district court did not err and because its decision has no precedential effect, the certiorari petition should be denied.

Respectfully submitted,

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